IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

WP(C).No. 13739 of 2006(I)

CMP.283/2005 of FAMILY COURT, KOTTARAKKARA
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PETITIONER:

SUNIL KUMAR, S/O.GOPALAKRISHNA PILLAI,
SUNIL NIVAS, UPPUDU MURI, KIZHAKKE KALLADA VILLAGE
KOLLAM TALUK.

BY ADV. SRI.VINOY VARGHESE KALLUMOOTTILL

RESPONDENTS:
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1. JALAJA, D/O. THANKAMMA,
MYLOTTU VEEDU, UPPUDU MURI,KIZHAKKEKALLADA VILLAGE
KOLLAM TALUK.

2. SUB INSPECTOR OF POLICE,
KIZHAKKE KALLADA POLICE STATION.

BY ADV. SMT.T.S.MAYA (THIYADIL)
SMT.REKHA NAIR
BY GOVT. PLEADER MR. MANOJ KUMAR K.V.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

PETIITONERS EXTS:
EXT.P1: TRUE COPY OF THE ORDER DT. 28-2-2005 IN CMP.NO.283/2005 IN M.C.NO.299/1997 OF THE FAMILY COURT, KOTTARAKKARA.

EXT.P2: TRUE COPY OF THE ORDER DTD. 30-3-2006 IN CMP NO. 283/2005 IN MC NO. 299/97 OF THE FAMILY COURT, KOTTARAKKARA.

RESPONDENTS EXTS:

EXT.R1(A): JUDGMENT IN CRL.M.A.NO.1882/2005 IN RP (FC)181/20004 DT. 18-2-2005.

KS.

TRUE COPY

P.S.TO JUDGE

K.A.ABDUL GAFOOR & K.R. UDAYABHANU, JJ.

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W.P.C.NO. 13739 OF 2006

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DATED THIS THE 5TH DAY OF DECEMBER 2006

JUDGMENT

Abdul Gafoor,J.

The prayer in the writ petition is to quash Ext.P1 order. Counsel submits before us that mentioning of Ext.P1 order is a mistake and what his client had intended to set aside is Ext.P2 order. We are proceeding the case in that frame.

2. Admittedly the writ petitioner faced an order from the Family Court, Kollam to pay maintenance to the child at the rate of Rs.350/- per mensum. However, admittedly, the amount had not been paid. An application by the mother of the minor child seeking payment of the said amount was filed. It resulted in Ext.P1 order which reads as under:

> *"Petitioner present. C.P.present. amount not paid. C.P.is sentenced to imprisonment for one month. Issue distress warrant for realization of amount."*

This imprisonment order is issued in terms of Sub-Section (3) of

Section 125 of the Code of Criminal Procedure. According to the parties, the petitioner had undergone the imprisonment ordered in Ext.P1 dated 28-2-2005. Thereafter, on 30-3-2006 when the mother of the child pursued the said application, a further order was issued, i.e. Ext.P2. It reads as follows:

> "*Distress warrant returned. Issue non-bailable warrant. Report 27-5-2006.* "

As already mentioned at the threshold, this order is under challenge.

3. The contention of the petitioner is that for realization of an amount, only one imprisonment alone is permissible and the purpose behind Ext.P2 is to punish him again for realization of the same amount for which he had already undergone imprisonment ordered in Ext.P1. Ext.P1 was issued on an application for realisation of an amount of Rs.21,350/-, which is the aggregate amount of maintenance for 84 months. In support of the contention, the decision reported in **Shahada Khatoon v. Amjad Ali, [2000(1)KLT 696 (SC)]** is much relied on. Going by the decision, Ext.P2 is bad, it is contended.

4. In reply to this contention, it is submitted by counsel for

the first respondent that the punishment provided for in sub-section (3) of Section 125 Cr.P.C. limiting the imprisonment for one month is for each breach. The breach is continuing one. Therefore, whenever the further complaint of non-payment is made, further imprisonment is permissible. It is also submitted that the order of the Magistrate is to pay maintenance for each month. Therefore, there is non-compliance of the order at the end of every month. Merely because of one application for a consolidated amount for 84 months is filed, it cannot be contended that there was only one breach; whereas in effect there were breaches for each month which shall be punishable with imprisonment for a term of one month on each of the said occasions. In this regard counsel for the first respondent has relied on the decisions reported in **Mohammed Kutty v. State of Kerala[1984 KLT 835], Bhakta Bhuyan v. Smt.Savitri Bhuyan [1991(1)Crimes (Orissa)563]** and in **Ram Bilas v. Bhagwati Devi [1991 Crl.L.J.1098].**

5. In **Shahada Khatoon v. Amjad Ali** [**2000(1)KLT 696](supra)** it was held as follows:

"*The short question that arises for consideration is*

whether the learned Single Judge of the Patna High Court correctly interpreted sub-s.(3) of S.125 of Cr.P.C.by directing that the Magistrate can only sentence for a period of one month or until payment, if sooner made. The learned counsel for the appellants contends that the liability of the husband arising out of an order passed under S.125 to make payment of maintenance is a continuing one and on account of non-payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. We are unable to accept this contention of the learned counsel for the appellants. The language of sub-s.(3) of S.125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and therefore the only remedy would be after expiry of one month. For breach or non-compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief. By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month. In that

view of the matter the High Court was fully justified in passing the impugned order and we see no infirmity in the said order to be interfered with by this Court. The appeal accordingly fails and is dismissed."

6. The Supreme Court has thus specifically mentioned in that decision that **"for breach of non-compliance with the order of the Magistrate, the wife can approach the Magistrate again for similar relief".** That means merely because of undergoing imprisonment for one month provided for in sub-section (3) of Section 125, it cannot be stated that a breach will never occur. Therefore, the decision relied on by the petitioner does not support the case of the petitioner fully. This Court in **Mohammed Kutty v.State of Kerala** [1**984 K.L.T.835]** held that **"a month's imprisonment for every month's default is the maximum penalty under Section 125(3), and not a maximum of a month's imprisonment for the total default".** In the light of this pronouncement, the contention of the petitioner cannot be said to be sustainable.

Over and above this, even in Ext.P2 no imprisonment is yet ordered. In such circumstances also the contention raised by the petitioner cannot be said to be justified. Hence, the W.P.C.is dismissed.

SD/-
K.A.ABDUL GAFOOR
JUDGE

SD/-

K.R.UDAYABHANU,
JUDGE

ks. **TRUE COPY**

P.S.TO JUDGE